MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 293-1969
(202) 293-7674 FAX

June 30, 1998

Ms. Terry Tang
Editorial Writer
New York Times

FRITZ E. ATTAWAY
SR. VP GOVERNMENT RELATIONS
WASHINGTON GENERAL COUNSEL

VIA TELEFAX-212-556-3815 TOTAL 26 PAGES

Dear Ms. Tang:

Jack Valenti asked me to send you the attached material relating to implementation of the WIPO Treaties.

He also mentioned that you asked him about the release of movies in digital format in video stores like Blockbuster. The studios do release digital movies in video stores today. They are called DVDs.

DVDs cannot be copied in a digital format, and cannot be copied in analog format by most VCRs. DVD players contain circuitry that prevents copying under a voluntary agreement between DVD manufacturers and movie companies that was negotiated over the past several years. The manufacturers wanted to provide a secure environment to induce movie companies to release product in this new format, and the movie companies wanted to supply this potential new market so long as existing markets would not be destroyed in the process.

As a result, DVD manufacturers are successfully marketing a new consumer electronics device, movie companies have added to their home video market, and consumers can enjoy movies at home in a higher resolution, more convenient format. Discussions are taking place with the cable and satellite industries aimed at making copy control possible in pay-per-view and video-on-demand transmissions. If successful, movies could become available to consumers in higher quality resolution and sooner after theatrical release than is presently the case.

Implementation of the WIPO Treaties is a critical part of these efforts. Congress has already enacted laws prohibiting "black boxes" used to steal cable and satellite services. Now Congress is being asked to pass laws prohibiting "black boxes" that circumvent technology used to prevent theft of movies and other copyrighted works.

A safe and secure digital environment is in the interests of everyone -- except pirates. It is particularly in the interests of consumers who will benefit from greater availability of higher quality electronic products. Without effective theft protection, there would be no movies available on DVDs. Without effective security against theft, as well as against invasions of privacy, electronic commerce cannot flourish.

Please feel free to call me if you have any questions or if you would like additional material.

Sincerely,

cc: Jack Valenti

BA

EXHIBIT
24
Valenti

M-7204

CHRONOLOGY OF WIPO TREATY AND IMPLEMENTING LEGISLATION

November, 1991 – First Session of the World Intellectual Property Organization Committee of Experts on a Possible Protocol to the Berne Convention.

February, 1993 – President Clinton forms the National Information Infrastructure Task Force to study and make recommendations on new digital delivery systems like the Internet.

September, 1995 – Commerce Secretary Ron Brown releases Task Force Report which reflects voluminous public input from numerous hearings and written submissions over a two-year period. Report recommends following anti-circumvention legislation:

> "No person shall import, manufacture or distribute any device, product, or component incorporated into a device or product, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without the authority of the copyright owner or the law, any process, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights of the copyright owner under Section 106."

September, 1995 – Fifth Session of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention takes place in Geneva. U.S. proposes addition of anticircumvention provision that tracks the Task Force recommendation.

September, 1995 – Senators Hatch and Leahy introduce the NII Copyright Protection Act of 1995 which includes the anticircumvention language recommended by the NII Task Force.

January – December, 1996 – Copyright industries and on-line service providers negotiate language to provide limitations on copyright liability for service providers. Copyright industries take position that current law provides appropriate limitations for service providers. Service providers argue that amendments to current law are needed to provide immunity to providers when they remove infringing material upon notice by copyright owners. In turn, Rep. Bob Goodlatte and PTO Commissioner Bruce Lehman convene negotiations, but without success.

September – November, 1996 – U.S. Copyright industries and consumer electronics groups negotiate compromise anticircumvention language for WIPO Treaty.

December, 1996 – WIPO Diplomatic Conference in Geneva unanimously adopts Copyright Treaty containing compromise anticircumvention language:

> "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

January – July, 1997 – Copyright industries and consumer electronics groups meet to work out compromise language on WIPO implementing legislation. Although agreement is not reached with consumer electronics groups, copyright industries make significant compromises from language initially recommended by NII Task Force.

July, 1997 – Compromise implementing language proposed by Clinton Administration to the Congress and introduced by Senator Hatch and Congressman Coble. Provisions in the bill as introduced included:

> **No change in current law regarding exceptions or defenses to infringement, and new prohibitions against circumvention.**
> "No person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component, or part thereof that –
> (A) is primarily designed or produced for the purpose of circumventing a technological protection measure that effectively controls access to a work protected under title 17,
> (B) has only limited commercially significant purpose or use other than to circumvent a technological protection measure that effectively controls access to a work protected under title 17, or
> (C) is marketed by that person or another acting in concert with that person for use in circumventing a technological protection measure that effectively controls access to a work protected under title 17.";
>
> **Savings clause concerning fair use.**
> "[new anti-circumvention provisions do not] affect rights, remedies, limitations, or defenses to copyright infringement, including fair use."; and
>
> **No expansion of exclusive rights of copyright owners.**

January - December, 1997 - Negotiations with service providers continue without success.

January - March, 1998 – Negotiations with service providers continue, including under auspices of both House and Senate Judiciary Committee members.

April 1, 1998 – Copyright industries and service providers conclude agreement on limitations on service provider liability. Copyright industries agree to "safe harbors" where service providers cannot be held liable for monetary damages and in some cases even equitable relief if service providers are not aware of infringements and do not ignore "red flags" indicating that infringements are occurring. In return, service providers agree to support enactment of WIPO implementing legislation.

April 1, 1998 – House Judiciary Committee reports WIPO implementing legislation with special "browsing" amendment adopted that allows nonprofit libraries and archives to circumvent technological protections in order to decide whether to acquire a copy of the work. The amendment also ruled out monetary damages for innocent violations of anti-circumvention provisions by nonprofit libraries or archives, and exempted those entities from criminal liability. Representatives for the libraries were not satisfied with the amendment because they thought it did not go far enough. Negotiated service provider liability amendments were also attached to the legislation.

April, 1998 – Copyright industries work to conclude compromises on issues advocated by libraries (archival copies), educators (distance learning), Internet users (notification of takedowns) and broadcasters (ephemeral copies and copyright management information limitations).

House Committees on Commerce and Ways and Means ask for sequential referrals of the bill.

April 23, 1998 - Senate Judiciary Committee begins mark-up of WIPO bill, as amended by the House. An amendment is adopted that **expands the library exception** as it exists under current law. The amendments allow libraries and archives:

to make digital copies (currently banned) and use them on-site, without the copyright owner's permission, for preservation, security or replacement of damaged, lost or stolen copies; and

to make copies without the copyright owner's permission to replace obsolete formats, and to use digital copies on-site.

Senator Hatch then cited nine additional issues that had not yet been resolved by the parties. Most of the issues were raised by Senator Ashcroft, who said he would not support the bill until his concerns were addressed. Senator Hatch held the bill over for one week, with the expectation that the parties would come to agreement on the outstanding issues during that time.

April 30, 1998 - Compromises were reached on all outstanding issues and the bill was unanimously voted out of the Committee. The following amendments were adopted:

(1) Decompilation: This amendment specifies the right to use technical tools to access and analyze elements of computer programs not otherwise accessible, as a step in the independent development of compatible programs, to the extend currently permitted by copyright law. By clarifying that decryption of portions of a program for this purpose is not a violation, the legislation will aid in the development of competitive software that works with computer programs that are already on the market;

(2) Pornography: Responding to concerns that pornographers might use encryption to sneak their products past Internet filtering programs, this amendment gives courts flexibility in any case in which it is necessary to include a decryption component in a product aimed at protecting children from harmful material on the Internet;

(3) Product Design: This amendment clarifies that there is no obligation to design into any new computer or electronics product a response to any particular current or anticipated protective technology. However, it remains illegal to develop or market a product primarily for the purpose of circumventing technological protections;

(4) Privacy: This amendment clarifies that this legislation has no impact on the enforcement of any laws designed to prevent violations of personal privacy on the Internet;

(5) Law Enforcement: The existing provision of the bill allowing authorized law enforcement agents to circumvent protections in the course of their work was expanded to cover contractors;

(6) Distance Learning: This amendment directs the U.S. Copyright Office to study the impact of digital and network technologies on current legal rules for use of copyrighted materials in distance learning, and to recommended needed changes in the law.

(7) Broadcasters: Two new amendments were adopted. The first, updating an existing provision of the Copyright Act, allows broadcasters to bypass technological controls in order to make temporary copies of copyrighted material when technically required to do so in order to make an authorized broadcast of the material. The second preserves the right of broadcasters to edit or omit credits and similar identifying information about copyrighted material if technically necessary to maintain signal quality or comply with other regulations or standards. In addition, the committee approved an amendment, previously added to companion legislation in the House, that forbids tampering with certain motion picture or sound recording credits with intent to promote copyright infringement.

(8) "Put-back" Procedures: This amendment provides a mechanism for restoring access to allegedly infringing material removed from an online system in response to a

technological protections against unauthorized access, copying, and redistribution would be even more devastating than in the cable or satellite environment.

It is clear that the WIPO treaties themselves contemplate this approach. The effective technological measures that treaty signatories must protect include all those "that restrict acts in respect of" copyrighted materials. If the drafters had meant to limit the scope of the required protection to acts that constitute infringement, they would have said so. By placing the technological protection articles outside the framework of the exclusive rights spelled out in the text of the treaty, the Diplomatic Conference clearly expected that circumvention would be treated, not as an infringement of copyright, but as a separate and distinct offense, for which effective legal remedies are required. This is precisely the approach taken by H.R. 2281.

11. **Will Section 1201 overrule the Supreme Court's Betamax decision?**

No. That 1984 decision approved the use of VCRs for home taping, for time-shifting purposes, of free, over-the-air, unscrambled, unencrypted broadcast television programs. The Court found that many of the copyright owners involved had already consented to this home taping. Section 1201 addresses a totally different factual situation. By definition, it **doesn't affect information that is freely available for all uses to all network users.** It only applies once the copyright owner has decided to use encryption, scrambling, or some other kind of protective technology, and only if that technology is effective.

To use an analogy, the VCRs involved in the Betamax case allowed people to walk through an open doorway. The devices and services targeted by section 1201 allow people to pick locks, break and enter, and haul away the booty. Outlawing the latter has no impact on the former.

The Betamax case would remain good law even after enactment of Section 1201. That case concerned whether sales of VCRs could be considered contributory copyright infringement of the free, unprotected, over-the-air broadcasts that people copied at home for time-shifting. The Supreme Court said no, and nothing in this legislation would change that. In fact, nothing in H.R. 2281 makes any changes to the doctrine of contributory copyright infringement. It's the opponents of the implementing legislation who want to do that, by making it impossible for network service providers to be held contributorily responsible for their role in copyright infringements taking place over their systems.

technological protections against unauthorized access, copying, and redistribution would be even more devastating than in the cable or satellite environment.

It is clear that the WIPO treaties themselves contemplate this approach. The effective technological measures that treaty signatories must protect include all those "that restrict acts in respect of" copyrighted materials. If the drafters had meant to limit the scope of the required protection to acts that constitute infringement, they would have said so. By placing the technological protection articles outside the framework of the exclusive rights spelled out in the text of the treaty, the Diplomatic Conference clearly expected that circumvention would be treated, not as an infringement of copyright, but as a separate and distinct offense, for which effective legal remedies are required. This is precisely the approach taken by H.R. 2281.

11. **Will Section 1201 overrule the Supreme Court's Betamax decision?**

No. That 1984 decision approved the use of VCRs for home taping, for time-shifting purposes, of free, over-the-air, unscrambled, unencrypted broadcast television programs. The Court found that many of the copyright owners involved had already consented to this home taping. Section 1201 addresses a totally different factual situation. By definition, it **doesn't affect information that is freely available for all uses to all network users.** It only applies once the copyright owner has decided to use encryption, scrambling, or some other kind of protective technology, and only if that technology is effective.

To use an analogy, the VCRs involved in the Betamax case allowed people to walk through an open doorway. The devices and services targeted by section 1201 allow people to pick locks, break and enter, and haul away the booty. Outlawing the latter has no impact on the former.

The Betamax case would remain good law even after enactment of Section 1201. That case concerned whether sales of VCRs could be considered contributory copyright infringement of the free, unprotected, over-the-air broadcasts that people copied at home for time-shifting. The Supreme Court said no, and nothing in this legislation would change that. In fact, nothing in H.R. 2281 makes any changes to the doctrine of contributory copyright infringement. It's the opponents of the implementing legislation who want to do that, by making it impossible for network service providers to be held contributorily responsible for their role in copyright infringements taking place over their systems.

Section 1201
Questions and Answers

Q. Does "technological protection measure" need to be more specifically defined?

A. No. Copyright owners today use a number of different technologies — encryption, scrambling, electronic envelopes, secure digital watermarks — to control access to or use of their works. Undoubtedly new and better protective technologies will be developed in the near future. Limiting the scope of section 1201 to a short list of specific protective technologies, as some advocate, would virtually guarantee that the statute will quickly become obsolete. That would leave pirates legally free to circumvent an unlisted protective technology, even if that technology was superior to one that was mentioned in the statute.

The key definitional issue is not what constitutes a "technological protection measure," but whether that measure is "effective." (If a measure is not effective — if it can't be expected to prevent unauthorized access or copying -- then it's not a violation of section 1201 to circumvent it or to provide the tools for doing so.) In this context, "effective" protection is defined. An access control is effective if, "in the ordinary course of its operation, [it] requires the application of information, or a process or treatment, with the authority of the copyright owner, to gain access to the work" (section 1201(a)(3)(B)). A control on copying, or on another exclusive right, is effective if, "in the ordinary course of its operation, [it] prevents, restricts or otherwise limits" copying or the exercise of another exclusive right (section 1201(b)(2)(B)).

Courts should not find it difficult to apply the common-sense principle that, if a protective measure ordinarily works to secure copyrighted material, providing tools to circumvent it is a violation. This concept does not depend on pinning down fast-changing technology, nor does it require Congress to revisit the statute every year or two to update a list of technologies that are illegal to circumvent. Nor is it self-evident that the courts would find it easier to apply undefined technical terms in the CEMA-proposed definition of technological protection measures — terms like "encrypt," "scramble," "attributes," or "recording status" — than to apply the legislation as currently drafted.

In past legislation originating in the Commerce Committee aimed at outlawing cable and satellite "black boxes," Congress wisely avoided restricting the prohibition to devices that attacked a limited list of favored technologies. Instead, it focused on whether the device was "intended ... for unauthorized reception" of cable programming (47 USC 553(a)(2)), or was "primarily of assistance in the unauthorized decryption" of satellite signals (47 USC 605(e)(4)), regardless of the specific mode of scrambling, encryption or other protection which the device circumvented. Courts have not had much difficulty in applying these statutory provisions, and they have remained viable despite rapid changes over the past 15 years in the methods used to protect these delivery media and the content

they carry. The Committee should build on these successful precedents and reject suggestions to confine section 1201 to the protection of technologies appearing on a predetermined list.

CEMA also suggests that technological protection measures should be covered by section 1201 only if they "reflect a consensus among copyright owners, manufacturers of computing products, and consumer electronics companies." Of course, such consensus is desirable, and some copyright industry representatives have devoted literally thousands of hours over the past several years in efforts to achieve it. But making consensus a prerequisite to protection would leave vulnerable to circumvention the many protective technologies that are in use today, and others whose introduction may precede the achievement of the inter-industry consensus CEMA calls for. This proposal amounts to a declaration of an open-ended "open season" on encryption, scrambling and other protection methods, and would completely fail to achieve the treaties' requirements of providing adequate and effective protections against circumvention now.

2. **Should Section 1201's three-part liability test be made cumulative?**

No. Section 1201 is already narrowly drawn to avoid any impact on legitimate products or services. Even if a device can be used to break through technological protections, it is only prohibited if the plaintiff can prove one of the following three facts:

the device was primarily designed or produced for the purpose of circumvention;
the device was knowingly marketed for use in circumvention; or
the device has only limited commercially significant uses other than to circumvent.

Some have proposed making this three part test cumulative. By changing "or" to "and", this approach would require all three of these tests to be satisfied before a producer or distributor of a circumvention device could be held liable.

This change would completely gut section 1201, leaving it far short of the WIPO treaties' requirement that each country provide "adequate and effective" protection against circumvention. For example, assume that a device is produced solely for the purpose of circumvention. While this would satisfy the first prong of the test, the manufacturer could easily avoid either of the other two prongs, and thus escape any liability whatsoever. For instance, the manufacturer could market the device directly to consumers without explicitly stating its use in circumvention, thus evading the second prong of the test. Or the manufacturer could package the device with components that do have commercially significant legitimate uses, thus evading the third prong, even if it markets the resulting product for the express purpose of circumvention.

Changing "or" to "and" in the three-part test under section 1201 would be neither a minor nor a technical change. Instead, it would provide pirates with a clear roadmap around the prohibitions of the statute. The result would be a booming — and legal — market in circumvention devices and services, and a hostile digital environment for all copyright

owners.

3. **Does section 1201 mandate that products be designed to respond to particular technological protections?**

No. Section 1201 has never imposed any design mandate on any product to respond affirmatively to any technological protection measure. The only design mandate it imposes is a negative one: not to design a device, component or service primarily for the purpose of circumventing a technological protection measure.

An amendment adopted in the Senate (section 1201(c)(3) of S. 2037) underscores this point. It states that "[n]othing in this section shall require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications or computing product provide for a response to any particular technological protection measure, so long as sueh part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1)." If a product is not otherwise prohibited under section 1201 — if it does not satisfy at least one of the three tests for liability — the fact that it fails to respond to a particular protective technology — current or future — does not make it prohibited.

Some parties would like to stand this clarification on its head. They seem to argue that the failure to design a device to respond to a particular technological protection measure should somehow immunize it against liability under section 1201, even if it otherwise meets one or more aspects of the three-part test outlined above. That absurd result would follow from the elimination of the last phrase in the Senate amendment ("so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1)"). While opponents claim this phrase makes the provision "circular," in fact its elimination would make the clarification meaningless. If the phrase is eliminated, a product that was designed for the explicit purpose of breaking through an effective encryption measure would be immunized from liability if, as a result of the same design decision, it also failed to respond to another, ineffective technological protection measure.

4. **Should circumvention be prohibited only if it is furtherance of copyright infringement?**

No. That restriction (a) would be unprecedented in U.S. law; (b) would undermine the effectiveness of section 1201; and (c) would fall far short of compliance with the WIPO treaties.

At least twice in the 1980's, Congress, acting on the recommendation of the Commerce Committee, outlawed the production and distribution of tools used to circumvent technological controls on access to copyrighted materials. In neither case did Congress require proof that the tools in question — black boxes used to steal cable transmissions, 47 USC 553(a)(2), or equipment for decryption of satellite signals, 47 USC 605(e)(4) —

be linked to infringement of copyright. Nor has it ever been a defense to criminal or civil prosecution under these laws that the person stealing the signals, or the party providing him with the equipment to do so, did not intend to commit a copyright infringement. In addition, neither fair use, nor the existence of alleged "substantial non-infringing uses," is a defense to civil or criminal liability under these statutes.

These "anti-black box" laws have been effective legal tools over the past 15 years in safeguarding the security of copyrighted materials distributed via cable or satellite. They have had no adverse impact on research, education, technical innovation, or legitimate competition. H.R. 2281 simply seeks to apply the same principles to outlaw "black boxes for the Internet." As it does so, Congress should not discard the experience gained under these existing laws by placing unnecessary new roadblocks in the way of enforcement of the new legislation.

(b) Those new roadblocks would be substantial. If a copyright owner (or the proprietor of an effective technological control mechanism) were required to prove that a particular "black box" device was intended to be used "for the purpose of facilitating or engaging in an act of infringement," what would have to be proven? That the device could only be used to infringe? That it had, in fact, already been used to infringe a particular work at a particular time and place? That the producer or distributor of the device subjectively intended that it be used to infringe, rather than for some other purpose? Any of these formulations would impose such a burden on the plaintiff or prosecutor that it would become almost impossible to hold anyone liable unless they were "caught in the act" of using the device in question to commit an infringement. Manufacturers and distributors of circumvention products and services would probably go scot-free.

(c) The WIPO treaties require "adequate legal protections and effective legal remedies" against circumvention. If section 1201 were saddled with the extra (and unprecedented) burden of proving "furtherance of infringement," there is no chance that it would meet the "adequate and effective" test. . In fact, imposing a requirement to prove "furtherance of infringement" is, on its face, inconsistent with the treaties' requirements. The effective technological measures that treaty signatories must protect include all those "that restrict acts in respect of" copyrighted materials. If the drafters had meant to limit the scope of the required protection to acts that constitute or that further infringement, they would have said so. By placing the technological protection articles outside the framework of the exclusive rights spelled out in the text of the treaty, the Diplomatic Conference clearly expected that circumvention would be treated, not as an infringement of copyright, but as a separate and distinct offense, for which effective legal remedies are required. This is precisely the approach taken by H.R. 2281.

SECTION 1201: CONCERNS AND RESPONSES

Protective technologies — such as encryption, scrambling, or the use of electronic envelopes or watermarks — are key tools that will enable more electronic commerce in copyrighted materials over the Internet. Recognizing this fact, both of the two WIPO treaties require that countries "provide adequate legal protection and effective legal remedies" against circumvention of technological protections that are used by copyright owners to protect their works, both on and off the Internet. The treaties implementation legislation — H.R. 2281 — meets this obligation by adding to Title 17 of the U.S. Code a new section 1201, to outlaw trafficking in high-tech burglar's tools that are used to defeat these protections.

As introduced, section 1201 was narrowly drawn to avoid any impact on legitimate products or services. Even if a device could be used to break through technological protections, it was only prohibited if the plaintiff could prove that it was primarily designed, produced, or marketed for that purpose, or that it had only limited commercially significant uses other than to circumvent. Nevertheless, ever since legislation to implement the WIPO treaties was introduced in both the House and the Senate last fall, some people have been complaining that the anti-circumvention provisions are "too broad," and would inhibit socially useful activities or discourage innovation.

The Concern: Under section 1201 as introduced, a manufacturer could be held liable just because its distributor marketed its product for use in circumvention of technological protections.

The Response: An amendment clarifies that not only must the manufacturer and the distributor be acting "in concert," but also that the manufacturer can't be held liable on this basis unless it knows that the distributor is marketing the product for this illegitimate use.

The Concern: Under section 1201 as introduced, the importation or subsequent sale of alleged circumvention tools could have been stopped through a fast-track, non-judicial proceeding at the International Trade Commission under section 337 of the Tariff Act.

The Response: Due to jurisdictional problems, this provision has been dropped from the bill; copyright owners seeking to stop importation or subsequent sale of illegitimate products or services must now persuade a court to do so.

The Concern: The well-established doctrines of vicarious and contributory liability determine when parties can be held responsible for the copyright infringements of others. Section 1201 as introduced was silent on the legislation's impact on these doctrines, raising fears in some quarters about whether judicial precedents implementing these doctrines — such as the Supreme Court's 1984 "Betamax" decision — might be affected, or even overturned.

The Response: A new provision explicitly states that these doctrines are neither enlarged nor diminished by section 1201; thus, the Betamax precedent remains good law on contributory liability for copyright infringement.

The Concern: Some people read Section 1201 (as introduced) to impose new mandates on how computers, VCR's, or other consumer products would be designed. These critics feared that manufacturers might be liable if their products failed to recognize and respond to any protective technology that copyright owners might someday choose to employ.

The Response: A new provision addresses this concern, and makes clear that these products need not be designed to respond to any particular technological protection measure, so long as they are not designed for the purpose of circumventing such measures.

The Concern: Some feared that technological protection measures employed by copyright owners, backed up by Section 1201, would prevent libraries and similar institutions from "shopping" intelligently for copyrighted materials, by reviewing them in order to decide whether or not to purchase the materials.

The Response: A special exemption to the prohibition against circumvention of access control technologies, has been provided, for the specific benefit of nonprofit educational institutions, libraries and archives. The exemption permits these institutions to circumvent these protections on copyrighted works in the marketplace that aren't reasonably available in an unprotected format, so long as they do so for the purpose of determining whether or not to acquire a copy. This provision ensures the institution's right to "shop" for the protected product.

The Concern: While section 1201 as introduced contained an exception for the activities of law enforcement or intelligence agencies, some thought the exception was too narrow.

The Response: As broadened, this exception now extends to the circumvention activities of contractors to law enforcement or intelligence officials, so long as the contractor is performing legitimate investigative, protective or intelligence activities.

The Concern: Some critics thought section 1201 as introduced could be read to undermine court precedents (such as Sega v. Accolade) that allow copying of portions of computer programs, in a process called decompilation, when carried out for the purpose of achieving interoperability, and that therefore it could stifle competition in the computer software business.

The Response: An amendment to section 1201 now allows the circumvention of access controls on computer programs, and even the development, use and sharing of circumvention tools, to the extent necessary to enable an independently created computer program to work together with another program and exchange information, as provided by precedents such as Sega.

The Concern: If pornographers and other purveyors of material harmful to minors use encryption or similar technological measures to protect their works, they could, in theory, undercut the effectiveness of software filters parents use to control their kids' access to the Internet. Critics charged that the providers of such parental empowerment tools, and the parents who used them, might somehow be viewed as violating section 1201 if their software broke through the pornographers' protections in order to identify objectionable material.

The Response: If, in the future, it proves necessary to incorporate in these otherwise permissible parental empowerment tools a component or part primarily

designed for the purpose of decrypting or otherwise circumventing technical protection measures, an amendment to section 1201 specifies that courts may take this fact into account.

The Concern: Under section 1201 as introduced, libraries, schools and similar institutions had the same potential exposure to damages as any other defendant.

The Response: An amendment forbids courts from imposing any monetary damages on nonprofit libraries, archives or educational institutions for innocent violations of section 1201.

The Concern: Under section 1201 as introduced, libraries and schools could be criminally prosecuted for violations, just like any other defendant.

The Response: As amended, the criminal liability provisions enforcing section 1201 do not apply to any nonprofit libraries, archives or educational institutions.

The Concern: Some critics worried that if future privacy-invasive technologies on the Internet involved the encryption or other technological protection of copyrighted materials, section 1201 could prove an impediment to individual Internet users in their efforts to protect their privacy.

The Response: A savings clause was added to ensure that section 1201 neither weakens nor provides a defense to any Internet privacy protection law.

• • •

Section 1201 — a targeted legal tool to begin with — has been narrowed significantly during the legislative process. Any further cut-backs would threaten its adequacy and effectiveness, the two standards U.S. law must meet in order to comply with the WIPO treaties. It's time to enact section 1201, put high-tech burglars out of business, and set an example for other countries to follow as they upgrade their laws for the digital age.

Publishers' Response to the Library Community's Testimony on WIPO Copyright Treaty Legislation (H.R.2281) 6/10/98

The library community's June 5, 1998 testimony before the House Telecommunications Subcommittee claimed that Section 1201(a) of H.R.2281, which prohibits the circumvention of technological protection measures that control access to a copyrighted work, would:

* give copyright owners "a new and unrestricted exclusive right to control access to information in digital works,"

* negate the "right to browse" or to make "fair use" of copyrighted works, and

* permit the copyright owner to impose "pay-per-use" requirements, even after a copy of the copyrighted work has been lawfully acquired by a library.

To remedy these alleged problems, the testimony called for a "two-part amendment" to Section 1201 which would (1) prohibit "circumvention" only "for the purpose of facilitating or engaging in an act of infringement," and (2) make all rights, limitations and defenses available under Title 17 "applicable to actions arising under" Section 1201.

Following this testimony, Chairman Tauzin asked whether Section 1201 will allow library patrons to continue to borrow library materials or will require patrons to pay for every use.

RESPONSE:

1. Section 1201 – New and Unprecedented Rights and Prohibitions? Not At All!

H.R.2281 does not give copyright owners any new exclusive rights. The Copyright Act already establishes a copyright owner's exclusive right "to distribute copies... of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. 106(3). A copyright owner is presently free to use technological protection measures to control public access to a copyrighted work. H.R.2281 sets out the circumstances in which it is illegal to circumvent these measures, or to produce or distribute tools for doing so.

Moreover, it not "new" or unprecedented for Congress to prohibit circumvention of technological protection measures used to control access to copyrighted materials, or to outlaw trafficking in circumvention devices. Through legislation originating in the Commerce Committee, it did so in 1984 with respect to cable TV services (47 U.S.C. 553), and again in 1988 with respect to satellite distribution services (47 U.S.C. 605). These laws provided no exemption for libraries or educational institutions, created no "fair use" exception, and did not require proof of intent to infringe. Section 1201 simply applies the same principles without regard to the kind of distribution media involved.

2. The "Fair Use" Doctrine – A Circumstantial Defense, Not A "Right of Access"

Both Congress and the Supreme Court have emphasized that "fair use" is not a categorically-defined "right" but a common-law equitable defense to an allegation of infringement which, as it has been codified in the Copyright Act, "requires a case-by-case determination whether a particular use is fair." *See* H.R.Rep.No. 94-1476, p.66 (1976); *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 550 (1985). In each case, the determination must be made based upon consideration of four nonexclusive statutory factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion of the work that is used, and (4) the effect of the use upon the potential market for or value of the copyrighted work. *See* 17 U.S.C.107.

The "fair use" doctrine does *not* give anyone a "right of access" to a copy of a copyrighted work; instead, under certain circumstances, it allows a person who has lawfully obtained a copy of the work to engage in certain conduct (e.g., reproducing a portion of the work) that would otherwise constitute copyright infringement when done without the permission of the copyright owner. "Access" is not "use;" if fair use *did* create an access right, individuals could legally justify burglarizing libraries, museums, retail stores, and even homes when done for the purpose of making fair use of the works kept in such places.

3. The "Right" to Browse – A Useful Capability, Not A Legal "Right"

Similarly, the Copyright Act does not establish a "right to browse" copyrighted works. Browsing is not a legal right and no one is legally obligated to allow or facilitate browsing of copyrighted works. The *ability* to browse is not a requisite of fair use or any other limitation on the exclusive rights of copyright owners, but results entirely from a variety of practical considerations that determine whether the person who owns, possesses or otherwise lawfully obtains access to a copy of a work will make it available to others in a manner that facilitates browsing. Such considerations may differ depending upon the nature of the work, the person or entity making the copy available to others, and the anticipated users.

For example, rare, valuable, or fragile copies of works are typically not available to everyone for browsing in museums or libraries, even though such places may allow a select few scholars or other experts to browse them. The manner in which copies are displayed for aesthetic or other reasons may also prohibit allowing individuals to browse through them. Thus, copies of works that are sold with related but unattached components, such as CD-ROMs, fold-out figures or other enhancements, are often not available for browsing to avoid damaging or losing such components. In no way do these restrictions raise "fair use" issues.

In addition, the ability to browse -- under current law -- may turn on whether the work is made available in "hard copy" or in a digital format. For example, while law libraries routinely make "hard copies" of treatises, law reviews, case reporters and other copyrighted

works freely and fully available to students in a manner that maximizes their ability to "browse," they frequently do not do the same with "digital copies" of such works that are made available to students online.

With respect to online materials, where browsing search results is primarily the way many such works are used, the cost of online browsing may cause the library (or university) to impose course-related or time restrictions on browsing. In addition, the scarcity of terminals or other necessary equipment may also require some limitations on leisurely browsing.

Most importantly, the online potential for unauthorized (and infringing) reproduction and distribution of copyrighted works by patrons requires that either the publisher of the works or the library itself must implement safeguards to prevent such conduct, and these safeguards may limit the kind of browsing that can be done. If libraries expect to provide public access to copyrighted works through computer terminals and interactive digital networks that make the works instantly susceptible to flawless reproduction and widespread distribution of copies, the inherent risk to the legitimate interests of copyright owners requires that they should have greater responsibility to prevent infringing conduct by patrons using their facilities. In the context of interactive digital networks, they must be held to a higher standard than merely providing the simple notice that the Copyright Act currently requires to free them of responsibility and liability for "unsupervised use of reproducing equipment located on its premises." *See* 17 U.S.C. 108(f)(1). (These critical issues should be illuminated by the Copyright Office study of "copyright issues in distance education" which is required by the Senate version of this legislation.)

4. A World of Pay-Per-Use and Digital-Only Availability? No Way!

"Pay-per-use" is an arrangement that many kinds of copyright owners currently use to lawfully exploit the marketplace value of copyrighted works. But it is just one of many different arrangements, and it typically coexists with other arrangements rather than replacing them. Section 1201 will not materially affect these arrangements.

For example, although motion pictures have always been made available to the public on a pay-per-use basis through theatrical release, this did not prevent the development of a competing pay-per-use market for showings on premium cable TV channels. More significantly, neither of these arrangements has eliminated the ability to "borrow" copies of motion pictures at libraries, rent them at video stores, or purchase them outright from a variety of sources. And, of course, it has not eliminated the ability to watch them for free on over-the-air broadcast TV. Which method is chosen for making particular motion pictures available for public viewing depends upon a variety of considerations concerning the economic life cycle of a particular film, including the popular demand for viewing and the current state of competition from other motion pictures and other forms of entertainment.

Even libraries, including those at universities, currently use "pay-per-use" and other "borrowing prohibited" arrangements as part of the variety of ways in which they make different works in their collections (including hard-copy versions) available for use by their patrons. For example, while most books typically may be borrowed by the patron and used

off-premises, reference works and periodicals (even in hard-copy) are typically available for use only within the library. Similarly, while most hard-copy materials that can be borrowed may typically be taken off-premises by the patron for a fixed period of time at no charge, reservations and nominal fees are often required -- and the time allowed for use is typically more limited -- with respect to the borrowing of newly-acquired, "best-selling" works (even in hard-copy) that are in high demand from library patrons.

In addition, as previously noted, libraries (especially at universities) that afford their patrons access to certain online materials often have "pay-per-use" arrangements for such services, whether these involve actual per-use fees or policies permitting access only to those already paying tuition or some special membership assessment, to defray their own costs in acquiring the right and ability to access the materials. Similarly, materials that are available in CD-ROM formats are often subject to "use on-premises only" policies.

But in the future, as in the present, distinctive consumer tastes and the marketplace competition they promote will have more to do with ensuring the continued ability to purchase and borrow books in hard-copy than will copyright law. Based on current experience and industry forecasts, publishers know that purchasers of books -- whether they are libraries or bookstore patrons -- will not accept digital formats as complete substitutes for the availability of hard-copy books in a variety of recreational, educational and business contexts. Price, convenience, portability, and durability are just a few of the factors that will continue to lead some consumers -- including libraries -- to reject digital exclusivity and insist upon the continued availability of books in hard-copy. Even today, with more than twenty years of expanding use of online legal research databases, law libraries continue to maintain -- and students and faculty continue to use -- regularly-updated collections of hard-copy case reporters

And, whatever mix of digital and hard-copy versions of copyrighted works are used, we can fully expect to continue to see a variety of use arrangements -- including both "pay-per-use" and traditional "borrowing" arrangements -- employed, as needed, in particular contexts.

5. Proposed Library Community Amendments -- Unnecessary and Unworkable

Nothing in H.R.2281, including Section 1201, expands or otherwise changes what constitutes copyright infringement under the Copyright Act. Insofar as Section 1201 creates a separate legal prohibition against circumvention of technological protections that is wholly distinct from the Copyright Act's prohibitions against copyright infringement, the "two-part" amendment to Section 1201 proposed by the library community is unnecessary to ensure the continued vitality of "fair use" and other limitations and defenses with respect to the exclusive rights of copyright owners.

However, insofar as the "two-part" amendment to Section 1201 would transform the distinct circumvention prohibition into one conditioned on proof of an intent to infringe, the proposed amendment would make Section 1201 ineffectual in implementing the WIPO treaties obligation regarding technological protection measures. Indeed, it would thwart the

treaties' intent to enhance the anti-piracy arsenal for copyright protection by adding protective capabilities separate and apart from infringement actions.

As previously noted, none of the existing laws against circumvention of technological protections in specific media -- for example, the cable and satellite signal provisions of the Communications Act -- are limited to acts that constitute copyright infringement. To the contrary, it is not necessary to prove the infringement of any exclusive right in any specific copyrighted work in order to find liability under these laws.

And it is also clear that the WIPO treaties themselves contemplate this approach. The effective technological measures that treaty signatories must protect include all those "that restrict acts in respect of" copyrighted materials. If the drafters had meant to limit the scope of the required protection to "infringing" acts, they would have said so. In fact, their intent *not* to limit the protection in this manner is made clear by comparing Article 11 (Obligations concerning Technological Measures) with Article 12 (Obligations concerning Rights Management Information) -- the latter provision prohibits only conduct that "will induce, enable, facilitate or conceal an infringement," while the former has no such qualification.

In the context of H.R.2281, "circumvention" and "infringement" are intended to be treated distinctly as apples and oranges; otherwise, there is little point to Section 1201 and the treaty provisions it is intended to implement.

6. *Library Community Interests Are Protected By Previously-Adopted Provisions*

Digital technologies in general, and interactive digital communications networks like the Internet in particular, are providing wonderful opportunities for publishers and libraries to enhance their respective activities to the benefit of all users of copyrighted works. While both communities face challenges in rethinking and recasting their activities to exploit and adapt digital capabilities in their work, they have a long history of mutually-beneficial dealing that should allow them to continue to work well together.

As noted in the library community's testimony, libraries are an important market for publishers because many, if not most, of the works in their collections -- whether in hard-copy or digital formats -- are acquired through purchase. There is no reason to believe that this relationship will not continue productively in the future. The use of technological protection measures will not change these practices because, in their robust market of competing products and services, it is reasonable to expect that libraries will be unwilling to use limited acquisition budgets to obtain works that are subject to unreasonable restrictions on use. In this way, the publishers' self-interest is a strong safeguard against abuse of technological protection measures.

As the House Commerce Committee reviews H.R.2281, we hope it will be mindful of the ways in which previous actions on the legislation in the House and Senate Judiciary Committees have already produced a substantial number of provisions addressing the interests of the library community to the satisfaction of all of its champions in the Senate

complaint from a copyright owner, if the copyright owner fails to follow through on its claim of infringement.

(9) Universities: The Committee directed the Copyright Office to study the impact of the new liability rules on the responsibilities of universities, in their role as an online service provider for students or faculty members, for infringements which students or teachers carry out online.

May, 1998 - The copyright and service provider communities work together to move the legislation through the House Commerce Committee so that it can be voted on by the full House. Negotiations continue with the Senate Committee on Foreign Relations in connection with treaty ratification.

ANTI-CIRCUMVENTION AND WIPO TREATY IMPLEMENTATION

1. Why are technological protections needed to safeguard copyright in the digital environment?

The digital revolution opens up exciting new ways for people to enjoy the fruits of American creativity. Unfortunately, it also opens up new opportunities for copyright piracy, already a $20 billion global problem for U.S. creators. One way to fight back is to use technological protections to prevent unauthorized access to copyrighted material and illicit copying or distribution of protected works. Some of these protections are familiar, like the "scrambling" of cable television premium service signals in order to limit access to paid subscribers. Other protective technologies are more complex, like encryption of text or software transmitted over the Internet. Technology can be used to encapsulate copyrighted material in a tamper-resistant electronic envelope. It can be designed to allow for time-limited access, so that a customer can "test-drive" a software program before acquiring it, or buy the right to watch a hit movie on a one-time basis. And technology can inscribe an electronic watermark on digital material, so that the source of an unauthorized copy of any portion of the work can be reliably traced.

2. Why are legal protections against circumvention of technological protections necessary?

Scrambling, encryption and the like are key enabling technologies for electronic commerce, and an essential ingredient for an Internet that is rich in content and responsive to consumer needs. But no matter how sophisticated the technological protections employed, we can be sure that hackers, vandals and copyright pirates will be working hard to overcome them. Some of these will make it their business to hack through encryption, pick digital locks, steam open electronic envelopes, or obliterate digital watermarks so that valuable intellectual property can be stolen. That's why we need to back up technology with legal prohibitions against cyber-burglars and their tools.

3. What do the WIPO treaties require on anti-circumvention?

The delegates from some 100 nations who wrote the two WIPO treaties clearly recognized the key role of technological protections and the need to outlaw their circumvention. The two treaties contain virtually identical provisions that require signatory countries to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures" that copyright owners use to "restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

4. How does H.R. 2281 implement this requirement?

Like the rest of the bill, the anti-circumvention provisions of H.R. 2281 are designed to implement U.S. treaty obligations fully, but without stepping beyond implementation to address issues not directly raised by the treaties. The bill outlaws tampering with two kinds of

protective technologies: those that prevent unauthorized access to copyrighted material (proposed section 1201(a)) and those that prevent unauthorized copying and the exercise of other rights under copyright, such as distribution and public performance (section 1201(b)). In both cases, trafficking in devices or services that are intended to circumvent effective technological protection is outlawed. In addition, Section 1201(a) prohibits the act of circumventing access controls. The legislation provides civil and (in limited cases) criminal remedies for violation of these prohibitions.

5. **Is this type of anti-circumvention legislation unprecedented in the U.S.?**

Not at all. For instance, over the past decade and a half, Congress has outlawed devices that aim to descramble cable TV transmissions, or to decrypt satellite signals. In each of these laws, the manufacturer or distributor of the circumvention device or service can be held liable without proof of infringement of a specific exclusive right in a specific copyrighted work. H.R. 2281 simply takes the same anti-circumvention principle and applies it across the board to technologies used to protect access to and rights in copyrighted material, no matter how it is distributed. Because of the potential for instantaneous widespread distribution of copyrighted works, these protections are even more crucial in the Internet environment than in the cable or satellite distribution media covered by existing laws.

6. **Why can't the U.S. just outlaw the act of circumvention?**

Because that would not fulfill our obligation under the treaties, which require signatory countries to provide "adequate legal protection and effective legal remedies" against circumvention. Prohibiting the use of circumvention devices or services by consumers, without outlawing the activities of those who profit from the traffic in these implements of piracy, would meet neither test.

Many circumvention devices and services are designed for use by individual consumers in their homes. Practical considerations and privacy concerns rule out focusing enforcement efforts there. Those who call for this focus demonstrate either an indifference to personal privacy, or a canny recognition that if only the use of circumvention technologies is outlawed, enforcement will be virtually non-existent. They also ignore precedent: as noted above, all of the existing technology-specific anti-circumvention laws on the books focus on the purveyor of devices and services, not just the individual end-user.

⇒ Outlawing circumventing conduct rather than devices is a misdirected and ineffective solution, as it does nothing to stop or penalize the mostly foreign companies that profit by manufacturing and marketing circumvention devices. For instance, a conduct-oriented approach gives copyright owners no tools to stop at the U.S. border Game Doctor 64s and mod chips, both devices which enable the piratical copying of entertainment software, exported by their Hong Kongese and Taiwanese manufacturers.

⇒ Outlawing circumventing conduct rather than devices would also effectively deny U.S. copyright owners the ability to stop the foreign manufacture and sale of circumvention devices. If the United States adopts a conduct-oriented approach, foreign nations harboring the manufacturers of circumvention devices are sure to also pass conduct-oriented language, and the United States could not credibly object. Thus, copyright owners would have no recourse under the laws of those foreign nations to stop the manufacture of circumvention devices at its foreign source.

⇒ Outlawing circumventing conduct rather than devices would have negative public policy consequences by (1) forcing copyright owners to crack down hard on relatively innocent private citizens, and (2) in doing so, encouraging an invasion of privacy. For example, under a conduct-oriented approach, an entertainment software publisher is forced to sue the fifteen year old kid who uses a Game Doctor 64 to make copies of his Nintendo 64 cartridges for his friends. Because it is nearly impossible to identify the individual users of circumvention devices, a conduct-oriented approach is either meaningless or it encourages the copyright owner to employ extraordinary means, such as stings, which verge on invasions of privacy to identify the individuals using such devices.

7. **Will the legislation outlaw legitimate devices like VCR's and computers?**

Of course not. It only affects devices that clearly are for the purpose of breaking encryption, descrambling, or otherwise circumventing technological protections, as proven (directly or indirectly) by one of three legal tests spelled out in the legislation. Legitimate computer, home entertainment, or other equipment won't be affected, because these devices clearly fall outside all three tests:

- Ø Legitimate equipment is not "primarily designed or produced for the purpose of circumventing" technological protections;
- Ø Legitimate equipment is not "marketed .. for use in circumventing," or certainly not marketed in that way by the manufacturer itself, or someone "acting in concert with it";
- Ø Legitimate equipment would always have a "commercially significant purpose or use other than to circumvent."

When a device meets one of these three tests, its bad purpose is pretty clear. If it was produced in order to circumvent; if the manufacturer markets it for that purpose; or if the device isn't good for much else other than to break through an effective technological protection, then it

is clear why it's being produced and marketed. The legitimate manufacturer or distributor of a VCR, home computer, or similar equipment isn't going to be liable under any of these three tests. Indeed, theoretical speculation aside, the opponents of Section 1201 have yet to point to a single legitimate consumer product whose manufacture, distribution or use would be adversely impacted by enactment of this legislation.

8. **Will enactment of Section 1201 adversely affect innovation and research?**

No. It will encourage innovation that promotes electronic commerce by making the transmission of copyrighted materials over networks more secure. Legal protections will encourage more investment in developing technologies like "smart cards" to authenticate authorized access to networks; electronic envelopes and watermarking; conditional access protocols that allow free browsing, sampling, or time-limited use of software; and new copyright management systems that will make authorized delivery of copyrighted materials over networks cheaper, easier, and more efficient. The only innovation this legislation will discourage is the development of newer, less detectable ways to break encryption, descramble signals, steal access codes, or hack into private databases — and get away with it.

The same is true of legitimate encryption research, even if it takes the form of seeking to break encryption to demonstrate the flaws of a particular system. Just as some institutions employ computer hackers to test their security systems and identify vulnerabilities, without running afoul of computer crime statutes, so a legitimate researcher who is asked to test a system would neither be sued nor prosecuted after this legislation becomes law. Of course, if the researcher is part of a law enforcement investigative or protective activity, his actions are specifically excluded from liability under the law (section 1201(e)).

9. **Will enactment of Section 1201 cut back on the fair use doctrine?**

No. The fair use doctrine, which is codified in section 107 of the Copyright Act, is an important and well-established part of our copyright law. H.R. 2281 leaves that section of the law untouched and that doctrine undisturbed.

The fair use doctrine gives researchers, teachers, students, library users, and others a limited privilege to copy from works (and exercise other exclusive rights) without the permission of the copyright owner. It has always been applied on a case-by-case basis, using criteria set out in the Copyright Act, and it will be applied in exactly the same way once this legislation is enacted.

Of course the fair use doctrine has never given anyone a right to break other laws for the stated purpose of exercising the fair use privilege. Fair use doesn't say you can break into a locked library in order to make copies of the books in it, or that you can steal newspapers from a vending machine in order to copy articles and share them with a friend. In the same way, it distorts the fair use doctrine to use it to justify hacking through encryption, unauthorized descrambling, or other acts of circumvention, even if the stated purpose of doing so is to engage

in "fair use" activities. In fact, it's an insult to the millions of Americans who depend upon the fair use doctrine — students, teachers, and consumers — to suggest that they can't exercise their legal privileges without breaking some other law and trampling on the rights of creators and copyright owners. This argument was never raised when Congress passed the laws against cable and satellite signal piracy in the 1980's, and there is no evidence that those technology-specific anti-circumvention laws have hurt fair use.

Furthermore, the pending legislation takes an extra step to avoid penalizing any conduct that may constitute fair use. Section 1201(b) does not prohibit the act of circumventing technology designed to control copying (as distinguished from the section 1201(a) prohibition against circumventing technology designed to control access to protected materials). In other words, simply using a circumvention device or service in order to make unauthorized copies of a lawfully acquired work, or to exercise other exclusive rights with regard to the work, would not be enough to make an individual liable for a violation of the new Section 1201. Such unauthorized copying, distribution or performance of a work may or may not infringe copyright — that depends on how the existing fair use criteria are applied to the specific facts of the case — but it cannot violate the anti-circumvention provision itself. This is a further safeguard against any incursion on the fair use doctrine.

Finally, even with respect to access, the concerns of the libraries and universities have been addressed. A special exemption to the prohibition against circumvention of access control technologies was added to the legislation for the specific benefit of nonprofit educational institutions, libraries and archives. The exemption permits these institutions to circumvent these protections on copyrighted works in the marketplace that aren't reasonably available in an unprotected format, so long as they do it for the purpose of determining whether or not to acquire a copy. This provision ensures the institution's right to "shop" for the protected product, even if the copyright owner for some reason chooses to make none of it available to potential customers in unprotected form.

10. **Why isn't the anti-circumvention provision limited to acts that constitute copyright infringement?**

Section 1201 creates a separate legal prohibition, distinct from copyright infringement, against circumvention of technological protections. In so doing, it follows the precedents set by existing U.S. law, and the requirements of the WIPO treaties.

None of the existing laws against circumvention of technological protections in specific media — for example, the cable and satellite signal theft provisions of the Communications Act — are limited to acts that constitute copyright infringement. To the contrary, it is not necessary to prove the infringement of any exclusive right in any specific copyrighted work in order to hold the manufacturer or distributor of a cable or satellite "black box" liable under these laws. These laws have proven effective in fighting piracy and signal theft, and there is no record of abuse or overreaching. Section 1201 takes the same approach as these existing laws and applies it across the board, most importantly to the medium — the Internet — in which the ability to evade

and many in the House. (See attached summary listing of provisions.)

The publishing industry has worked in good faith with House and Senate legislators to craft these provisions and believes that they fairly respond to library community concerns while still permitting the bill to achieve its purpose of effectively implementing the WIPO treaties. It's time for the Committee, and subsequently the House, to approve the balance that has been achieved and move the bill to enactment.